



Since China embarked on its program to liberalise and open its economy to foreign investment in the late 1970s, investors from around the world have been increasingly eager to dive into this sea of opportunities. This interest was further boosted in late 2001, when China's accession to the World Trade Organization ushered in a new era in international trade, resulting in a surge in foreign direct investments (FDI) into China. Trade between China and countries such as the U.S. and Canada has also doubled for over the past five years.

In the early days of China's liberalisation, when the barriers to entry were still high, investments into China were confined largely to joint ventures with Chinese state-owned enterprises, when Wholly Foreign Owned Enterprises (WFOE) were still relatively unseen, but even then, the country's FDI grew steadily.

Today, WFOEs can be set up significantly easier in China with far fewer restrictions, and changes are continuously being made to lower barriers to entry. China's amended Company Law, which came into effect on January 1, 2006, introduced a series of further relaxed capital requirements for domestic companies. The amendments have made setting up in China more accessible to companies of a smaller scale such as SMEs. Although also incorporated in the amended law was the concept of "piercing the corporate veil" in respect of corporate governance, it has little impact on foreign investment decisions.

China's increasingly influential role in the international business arena is undeniable. Its low-cost of manufacturing has led to a phenomenon that has made "Asian price" the competitive standard in global product markets. Moreover, impressive industrial growth and prosperity has fuelled demand for an array of consumer products among the country's growing middle class of its 1.3 billion-

The Great China Appeal

大中華的吸引力

By Kishore K Sakhrani

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person market. The lure of the domestic Chinese market, and the temptation of lower cost-bases for manufacturers looking to re-export Chinese-made products, is continuing to attract staggering interest and foreign investment from all corners of the world.

Where are the challenges?

Foreign companies that rush themselves onto the China boat often make two common mistakes – firstly, going in without a carefully pre-planned entry strategy for risk mitigation, and secondly, no exit strategy in case things go astray or for ending a project. Often neglected is the critical role that Hong Kong has to play as the gateway to China, instead of investing directly in Mainland ventures. While there may be some short-term savings in going direct, the implications are many. These include exposure to potential risk, getting caught in China's tight monetary controls, entrapment in complicated application and corporate compliance procedures as well as trying to keep up to pace with the forever changing laws, or simply getting your money and profits back out of China.

The principle of "piercing the corporate veil," which allows the law to look beyond the company structure as introduced through the amended company law, adds another item to the risk portfolio. Although this may be a familiar common law concept, it may potentially be threatening to the parent company if not structured correctly to protect foreign assets.

Large and small companies face similar risks, although the situation may be more manageable for large multinational corporations that have greater financing capabilities and a larger tolerance for risk. This unfortunately is not the case for SMEs. Any wrong move may mean a very expensive and time-consuming fix.

Nevertheless, regardless of whether an investor is a large multinational corporation or an entrepreneurial SME, the question remains, why take the unnecessary burden of risk, when it can be mitigated?

Use a "Firewall" when investing in China

Elizabeth L. Thomson, President of ICS Trust (Asia) Limited in Hong Kong, who has been assisting clients with their corporate structuring requirements in China since the late 1970s, advises her clients "to incorporate a Hong Kong limited liability company to act as the firewall between their mother company and the China operation. Have everything set up in Hong Kong, including the banking facilities, and then establish the WFOE, joint venture or representative office in China to comply with Chinese legal requirements."

A Hong Kong company has three key functions as a firewall: firstly it creates an extra layer between the investor's parent company and the China operation, thus allowing it to enjoy extra protection within Hong Kong's world-class legal system. The Hong Kong company acts to limit the liability for the investor to what is invested in the Asian operation, therefore protecting the assets of the parent company. Should litigation arise, it should start and hopefully stop in Hong Kong without having to extend the liability to the jurisdiction of the parent company.

Secondly, by structuring through Hong Kong, the investor has the flexibility to operate in Hong Kong's highly reputable international finance and commerce centre, helping to avoid China's tight monetary controls and evolving banking processes.

Finally, Hong Kong has a territorial source principle of taxation, which means only profits that have a source in Hong Kong are taxable here, and profits that are deemed to have an offshore source are not

taxed. Put simply, if the decision to buy and sell is made outside of Hong Kong, even though the transactions may flow through a Hong Kong structure, the profits are deemed to be from an offshore source and thus not taxable in Hong Kong. Profits of a Hong Kong source are taxed in Hong Kong at a rate of 17.5%, whereas the corporate rate of tax in China is 33%, offering significant tax savings.

The Gateway to China

Traditionally, British Virgin Islands companies were commonly used in China entry business strategies, making it the second largest investor in China. However, in recent years, concerns about “round-tripping” (use of offshore companies by Mainland residents to avoid Chinese taxes and capital controls) have led to greater scrutiny of foreign investment applications where the applicant is domiciled in a traditional “tax haven” jurisdiction. Anecdotal evidence has circulated of cases where the Chinese authorities have required that all copies of corporate documents from a BVI company be duly notarized at the Chinese embassy in the United Kingdom, an expensive and time-consuming endeavour for most applicants.

Hong Kong applicants have no such problems. Hong Kong businesses were among the first to take advantage of business opportunities on the Mainland, and remain the single largest investors in every province and region of China, accounting for just over 50% of China’s total foreign investment stock of US\$156 billion. According to the Hong Kong Government, Hong Kong companies own well in

excess of 60,000 production facilities in the Pearl River Delta alone, employing upwards of 10 million workers, creating a strong reputation as the leading commercial centre for business in China.

Subsequent to this close connection, Hong Kong’s corporate documentation is familiar to officials in most Mainland investment regions, while Hong Kong professionals are equipped with a wealth of experience in handling the requirements and procedures of the Mainland government. As a result, authenticity is more easily verified and application-processing times are substantially lower.

Conclusion

Hong Kong’s mix of offshore tax advantages, transparent legal infrastructure and mature commercial business environment make it ideal as a “firewall” for doing business in China. A company structuring its China business through Hong Kong can often operate essentially tax-free, while at the same time enjoying strong legal protection, convenient sale or transfer of assets, and access to one of the world’s most dynamic financial centres. For most investment projects on the Mainland, the best structuring solution is actually the simplest one: set up a Hong Kong company to hold and provide administrative support to operations on the Mainland. ✨

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自從中國在七十年代後期逐步開放經濟及放寬門檻予外來投資後，世界各地的境外投資者爭相進入中國這個龐大市場，尋求商機。2001年，中國加入了世界貿易組織(WTO)，開創了國際貿易的新紀元，並加深了國際投資者對中國市場的濃厚興趣，來自外商直接投資紛至沓來；中國在過去五年，與其他國家(如美國及加拿大)之間的貿易額，亦見雙倍增長。

中國經濟開放初期，外來投資面對重重障礙，在中國的投資僅限於與國營企業以合資的模式運作，外資企業(WFOE)在當時仍屬罕見，儘管投資管道狹窄，在中國的外商直接投資卻仍穩健增長。

時至今日，中國不斷放寬對外商投資的規管，及持續修訂法例以減低在中國投資的障礙，在中國設立外資企業亦變得普遍及相對輕易。於2006年1月1日生效的中國公司法，制訂了一系列放寬對國內企業資本要求的措施，此舉令規模較小的外國公司，如中小型企業(SME)，可以較易進入中國市場。新修訂的中國公司法明確指出，假如股東以有限公司的名義逃避應負責任，以致損害公司債權人的利益，個別股東要為該行為負上無限責任，此舉對外來投資的取向亦造成一定的影響。

中國在國際商貿上的影響力與日俱增，毋容置疑。中國的低成本生產令全球的產品市場出現了以「亞洲價格」作為競爭標準的現象。同時，持續的工業增長及社會的繁華進步，促使中國13億人口中的中產階層對消費品的需求越見殷切。龐大的本土市場，加上以低成本生產商品用作出口的吸引力，令中國持續吸納世界各地投資者的目光及資金。

挑戰從何而來？

為趕上中國高速發展列車的外商公司經常犯上兩個通病：其一，在沒有謹慎計劃緩衝風險策略下進軍中國市場；其二，沒有預先為項目完成或計劃有變時定下撤出策略。外國公司往往忽視香港作為進入中國市場的門戶角色，而對內地進行直接投資。雖然直接投資可以減低短期支出，但外商同時亦承受多方面的潛在風險：包括受制於中國嚴格的金融規管，受困於繁複的申請及企業管理程序，朝令夕改的法規，或是無法讓資金與利潤匯出中國。

中國新修訂的公司法容許律法凌駕於公司架構之上，此舉增加了外商在中國營運的風險。雖然該法例是普通法中常見的概念，但如果沒有良好的公司架構去保障國外資產，海外母公司亦有可能受到威脅。

事實上，不論大小企業都面對類似的風險。只是大型的跨國企業因為有較強的經濟後盾和承受風險的能力，較易掌控情況。相反，中小企業沒有如此能力，任何錯誤決策都會令中小企業付出昂貴的時間與金錢代價。

不論投資者是大型跨國企業或是中小型企業，如果有方法可以避免額外的風險，為何還要承受不必要的負擔？

投資中國的風險管理

譚伊詩女士—香港 ICS Trust (Asia) Ltd 的總裁，在七十年代起，已經開始協助外商在中國組建公司。譚女士致力提倡客戶在香港成立有限公司，並以此作為海外母公司與在中國的

營運單位的重要風險管理工具。外商可以在香港為進軍中國市場作周全的準備，以應付法規要求，包括銀行服務，在中國設立外資及合資企業或代表處。

作為一個重要的風險管理工具，一家香港公司有以下三項重要功能：第一，在投資者的母公司和在中國的營運單位之間提供額外的保護層，使投資者在香港國際級的司法系統下，享有更多的保障。擁有一家香港公司可規限投資者在亞洲區營運投資的相關負債，從而保護母公司在海外的資產。當不幸遇上訴訟時，訴訟過程能夠起始並終結於香港，毋須把負債延伸至母公司的司法管轄區內。

其次，透過香港組建中國架構的投資者，可以獲得香港享譽國際的金融及商業中心所帶來營運上的彈性，有助規避中國嚴格的金融管制，以及未臻完善的銀行體系。

最後，香港所採用的地域來源原則稅制，即源自香港的利潤才會被徵稅，源自境外的利潤則不受此限。如果買賣合約在香港以外定下，即使是透過香港交易，利潤來源歸於境外，毋須被徵收稅款。源自香港的利潤，利得稅率為17.5%，而在中國境內的企業所得稅率則為33%，建立一個香港架構可以幫助外商成功節省稅務開支。

中國的門戶

傳統上，外國企業一般利用英屬維京群島註冊的公司作為進入中國的工具，令到這類型公司成為在中國的第二大投資者。不過近年來，中國當局對內地居民利用境外公司避開中國稅收及資本控制所引起的資金迂迴現象開始關注，對在傳統上有「避稅天堂」稱謂的司法管轄區所註冊公司提出的投資申請作出嚴謹的審查。曾經有不少個案，中國官方要求來自英屬維京群島註冊的公司所提交的企業文件，均需給予中國駐英國大使館做公證，此舉對大部分的申請企業來說不但費時，而且費用高昂。

香港的申請者則毋須面對以上的問題。港商是首批洞悉國內商機的投資者，而至今仍然是中國各省份及區域的單一最大投資者，投資額佔中國1,560億美元外來投資總額的一半以上。根據香港政府的數據顯示，香港企業僅在珠江三角洲一帶已經擁有超過六萬個生產工場，僱用了逾一千萬名工人，成為大中華地區內最具領導地位的商業中心。

多虧這個緊密的聯繫，內地可投資地區的官員都很熟悉香港的企業文件，而香港的專業人士亦對內地的有關要求及程序擁有豐富經驗，從而縮短香港公司在中國投資時所需要驗證文件及審批申請的時間。

結論

離岸稅制優勢，高透明度的司法體系及成熟的營商環境，讓香港成為投資中國大陸的理想風險管理工具。透過香港構建中國業務，可以令外商獲得免稅，同時享受健全法制的保護，便利的資產買賣或轉移，以及獲得以香港作為享譽國際的金融中心所帶來的方便與服務。在內地投資最簡單直接的方案，就是成立一家香港公司來持有國內的營運架構，並提供行政支援。

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